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IN THE

Supreme Court of the United States

October Term, 1964

No. 156

In re Establishment of NORWALK CALL as a Newspaper of General Circulation,

WHITEHEAD-DONOVAN CORPORATION,

Appellee,

vs.

HERALD PUBLISHING COMPANY,

Appellant.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, filed on May 6, 1963, and entered on May 7, 1963, in favor of Appellee and against Appellant, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions.

The judgment of the Superior Court was reviewed on appeal by the District Court of Appeal of the State of California, Second Appellate District, Division 2, and is reported in 228 Adv. Cal. App. 462, 39 Cal. Rptr. 490. A copy of the opinion is attached hereto as Appendix A. The opinion of the District Court of Appeal of the State of California was reviewed in the Supreme Court of the State of California, and the opinion of the Supreme Court of the State of California is attached hereto as Appendix B, and is reported in 62 Adv. Cal. No. 8, 187. Attached hereto and marked Appendix C is a copy of the Judgment and Decree Establishing the Norwalk Call Newspaper as One of General Circulation.

Jurisdiction.

Appellee sought a decree declaring it to be a newspaper of general circulation for the City of Norwalk, California. Appellant, a contesting newspaper, filed an answer opposing such a decree. The judgment of the Superior Court was entered on May 7, 1963, and Notice of Appeal was filed in that Court on May 15, 1963. The District Court of Appeal took jurisdiction and wrote an opinion on July 9, 1964, and a Petition for Hearing was filed in the Supreme Court of the State of California, and the Supreme Court of the State of California wrote an opinion on December 24, 1964. A Petition for Rehearing was duly filed on January 8, 1965, and an Order Denying the Rehearing was made by the Supreme Court on January 20, 1965, and a copy of the Order Denying Rehearing is attached as part of the official records of the proceed-

ings in the Court below. A Notice of Appeal was filed in the Supreme Court of the State of California on March 31, 1965. A certified copy of the Notice of Appeal is attached to the official records of the proceedings in that Court. The jurisdiction of the Supreme Court to review the decision by the direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on a direct appeal in this case:

Lathrop v. Donohue (Wis.) 1961, 81 S. Ct. 1826, 367 U.S. 820, 6 L. Ed. 2d 1191, reh. den. 82 S. Ct. 23, 368 U.S. 871, 7 L. Ed. 2d 72;

Kedoff v. St. Nicholas Cathedral of Russian Orthodox Church in North America (N.Y.) 1952, 73 S. Ct. 143, 344 U.S. 94, 97 L. Ed. 120.

Statutes Involved.

Government Code

"§6000. Newspaper of general circulation, definition.

"A 'newspaper of general circulation' is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement. (Stats. 1943, c. 134, p. 987, §6000.)"

"§6002. Established, definition; modification of name

"For a newspaper to be 'established,' it shall have been in existence under a specified name during the whole of the one-year period; provided, however, nothing herein contained shall prevent a modification of name in accordance with Section 6024 hereof where the modification of name does not substantially change the identity of the newspaper. (Stats. 1943, c. 134, p. 988, §6002, as amended Stats. 1953, c. 1295, p. 2855, §1.)"

"§6003. Printed, definition

"For a newspaper to be 'printed,' the mechanical work of producing it, that is the work of typesetting and impressing type on paper, shall have been performed during the whole of the one year period.

"If a monthly average of at least 50 per cent of the work of typesetting and a monthly average of at least 50 per cent of the work of impressing type on paper is done in accordance with the other provisions of this article, the requirements embodied in 'printed' are met. (Stats. 1943, c. 134, p. 988, §6003.)"

"§6004. Published, definition

"For a newspaper to be 'published,' it shall have been issued from the place where it is printed and sold to or circulated among the people and its subscribers during the whole of the one year period. (Stats. 1943, c. 134, p. 988, §6004.)"

"§6004.5 General circulation, definition

"In order to qualify as a newspaper of general circulation the newspaper, if either printed or published in a town or city, shall be both printed and published in one and the same town or city. (Added Stats. 1951, c. 937, p. 2538, §1.)"

"§6005. Printed and published as not synonymous

" 'Printed' and 'published' are not synonymous. Each relates to separate acts or functions necessary to constitute a newspaper of general circulation. (Stats. 1943, c. 134, p. 988, §6005.)"

"§6006. Standing of prior newspaper

"Nothing in this chapter alters the standing of any newspaper which, prior to the passage of Chapter 258 of the Statutes of 1923, was an established newspaper of general circulation, irrespective of whether it was printed in the place where it was published for a period of one year as required. (As amended Stats. 1961, c. 1217, p. 2955, §1.)"

"§6020. Petition, filing and verification

"Whenever a newspaper desires to have its standing as a newspaper of general circulation ascertained and established, it may, by its publisher, manager, editor or attorney, file a verified petition in the superior court of the county in which it is established, printed and published, setting forth the facts which justify such action. (Stats. 1943, c. 134, p. 988, §6020.)"

"§6040. Publication in newspaper as referring to newspaper of general circulation

"Whenever any official advertising, notice, resolution, order, or other matter of any nature whatsoever is required by law to be published in a newspaper, such publication shall be made only in a newspaper of general circulation. (Stats. 1943, c. 134, p. 989, §6040.)"

Question Presented.

Where two newspapers are published within the same town in the State of California, and where each is printed elsewhere than the town in which they are published, does the California Statute Section 6006 of the Government Code, as adopted in 1961, discriminate in a manner repugnant to the Federal Constitution Amendment XIV Section 1?

It is contended by Appellant that Section 6006 of the Government Code discriminated invidiously against Appellant by providing in 1961 that a newspaper which was an established newspaper of general circulation prior to 1923 is a newspaper of general circulation irrespective of whether the newspaper was both printed and published in the city where adjudication is sought.

Statement of the Case.

Appellant, Herald Publishing Company, is the publisher of a newspaper in the State of California, in the town of Norwalk. It is printed elsewhere in Los Angeles County. The Appellee, Whitehead-Donovan Corporation, also publishes a newspaper in the town of Norwalk called the "Norwalk Call." It also is printed elsewhere in Los Angeles County. In 1962 Appellee filed

a "Petition to Ascertain and Establish the Standing of the "Norwalk Call" as a Newspaper of General Circulation." Appellant contested the petition and filed an answer opposing the granting of the petition. As part of the answer, Appellant contended that Section 6006 of the Government Code, as amended, is unconstitutional under the Constitution of the State of California and the United States Constitution. After evidence being taken and the matter submitted, the Court filed its Judgment and Decree Establishing Newspaper as One of General Circulation. The Superior Court found that the newspaper was published in the City of Norwalk, but did not find that it was printed in the City of Norwalk, but determined that it was "an established newspaper of general circulation prior to and at the time of and ever since the passage of Chapter 258 of the Statutes of 1923 of the State of California, and is a newspaper of general circulation for the City of Norwalk and for the County of Los Angeles, State of California, irrespective of whether it was printed in the place where it was published; namely, Norwalk, California, for a period of one year prior to the filing of the petition herein."

Judgment therein was entered on May 7, 1963, after a notice of Motion for New Trial was denied on May 6, 1963, and a Notice of Appeal was filed on May 15, 1963.

Thereafter, the District Court of Appeal of the State of California, in its decision in disposing of Appellant's contention that Section 6006 was unconstitutional, noted:

> "Lastly, appellant contends that section 6006 is unconstitutional. 'Appellant's arguments in support

of this contention are quite persuasive and very similar to those which apparently were accepted by the appellate court whose decision it cites. It was therein stated: "To say, however, that the Legislature intended to prescribe for all times one set of requirements for newspapers theretofore established and a different set for newspapers to be established in the future would be to give to the amendment such a construction that the reasonableness thereof would become a serious question." (*In re Byers,* 25 P. 2d 236, 237.) However, a hearing was granted following this decision, and upon the same issue the court stated:

"'The further contention is made that such a construction of these sections of the Political Code renders the same unconstitutional and void for the reason that it is an attempt to classify the newspapers in the state into two classes, those established before the legislation of 1923, which are free from the requirements of such legislation, and those established at a later date, which are forced to comply with such requirements. This same contention in principle has been before this court on frequent occasions, one of the most recent of which was in the case of Jones v. City of Los Angeles, 211 Cal. 304 (295 Pac. 14). We there held that an ordinance excluding hospitals and sanitariums for the treatment of mental and nervous diseases from certain districts in said city was valid in so far as it purported to prohibit the establishment of such institutions within said district in the future, but that it was void when applied to an existing business of the same character in said district. Such a classification, if we may properly

use that term, may not be said to be an unreasonable application of the police power. Upon the same principle, it cannot be said in the present action that it is unreasonable to exatt certain requirements of a newspaper to be established in the future which are not required of those long established and which have proved their right to exist by a full compliance with all the laws in force at the time of their establishment.' (*In re Byers, supra,* 219 Cal. 446, 450.)

"The decision since has been cited with approval in *Hunter v. Justice's Court,* 36 Cal. 2d 315, 321 and *People v. Western Fruit Growers,* 22 Cal. 2d 494, 508. If any redetermination of this issue of law is now to be made, it is beyond the province of this court to do it."'

In the Supreme Court of the State of California, the judgment was again affirmed by a 4-3 decision. In the majority opinion written by Justice Mosk, the constitutionality again was disposed of as follows:

"In making its principal contention that section 6006 arbitrarily discriminates against newspapers established after enactment of the 1923 legislation, contestant is in effect asking this court to overrule In re Byers (1933) 219 Cal. 446. It was held there that the exemption was intended to relieve existing newspapers of general circulation, i.e., those meeting the standards prescribed as of 1923, from the burden of satisfying the new printing requirement and that such a classification differentiating established businesses from those to be established in the future was reasonable. *Byers* said it was not 'unreasonable to exact certain re-

quirements of a newspaper to be established in the future which are not required of those long established and which have proved their right to exist by a full compliance with all the laws in force at the time of their establishment.' (219 Cal. at p. 450. Accord, In re The Anaheim Daily Gazette (1963) 214 Cal. App. 2d 438.) In re The Napa Journal (1933) 132 Cal. App. 339, 342, contains broad language to the contrary, but it was decided six months prior to *Byers* and may be deemed to have been disapproved sub silentio.

"Legislation excusing existing businesses from noncompliance with new regulations has frequently been upheld (Hunter v. Justice's Court (1950) 36 Cal. 2d 315, 320; People v. Western Fruit Growers (1943) 22 Cal. 2d 494, 508; In re Weisberg (1943) 215 Cal. 624, 631; Matter of Stoltenberg (1913) 165 Cal. 789; Ex parte Whitley (1904) 144 Cal. 167, 171; Bohannon v. Board of Medical Examiners (1914) 24 Cal. App. 215; see discussion in 3 Witkin, Summary of Cal. Law (7th ed., 1960) 1958; 12 Am. Jur. 164; 136 A.L.R. 207, 220, and there would seem to be no persuasive reason to reach a different result here, or to disapprove the conclusion in *Byers*."

The minority decision, written by Chief Justice C. J. Traynor, and concurred in by Justices J. Peters and J. Tobriner, stated:

"It is my opinion that if the legislation is construed to grant this privilege to petitioner, it would deny the Norwalk Herald American equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution."

The Court then attempted to construe the statute in a manner which would reverse the judgment but still uphold the constitutionality of the Government Code section in question. However, in concluding, the Court noted:

> "In my opinion, section 6006 not only does not but cannot constitutionally exempt the Norwalk Call from the printing requirement."

A Substantial Question Is Involved.

The constitutional question raised in this case, namely whether Section 6006 of the Government Code arbitrarily discriminates against two newspapers essentially in the same position is a substantial one. By singling out in 1961 a newspaper which in 1923 might have qualified as a newspaper of general circulation but who can no longer qualify, the California Legislature is arbitrarily discriminating against the Appellant.

There are 76 incorporated cities within the County of Los Angeles (The Regional Planning Commission, County of Los Angeles, statistics). In each of these towns there is a considerable economic benefit for a newspaper to be a newspaper of general circulation for the city, by being designated as "an official" newspaper, to qualify for the publication of all official notices of not only the city but the school district and other underlying governmental districts in the area. It is also the newspaper selected for the publication of summons, probate notices, notices of default and foreclosure, notices of sale, and many other official notices. By giving a constitutional economic advantage to these newspapers who can qualify under the 1961 amendments, the court has tipped the economic balance in favor

of any such newspaper, or the successor in interest of any such newspaper, by allowing the economic aid from the publication of official publications for cities, school districts, courts and such other publications as are required to be published within the city. It has been noted by many that the economics of the newspaper business have led to the elimination of competition in most cities (Freedom of the Press Symposium, a Free and Responsible Press, 1947. The commission included the following members: Robert M. Hutchins, Zechariah Chafee, Jr., John M. Clark, John Dickinson, William E. Hocking, Harold D. Lasswell, Archibald MacLeish, Charles E. Merriam, Reinhold Niebuhr, Robert Redfield, Beardsley Ruml, Arthur M. Schlesinger and George N. Shuster) with the resulting lack of competitive reporting of the news. While it is true we have seen a growth in the means of communication through television, radio and large metropolitan newspapers, nevertheless, in the vital crucible of the small community there is noticeably less.

While the question presented to the Court does not directly involve the first amendment to the U.S. Constitution prohibition of acts of government against the freedom of the press, nonetheless, by reason of the decision, the Court has allowed a direct economic benefit to be granted by reason of governmental action to a particular class of newspapers without any sound, natural intrinsic or constitutional distinction between the newspapers. It is the Appellant's contention that the statute in question is invidiously discriminatory.

Underlying the right of the Legislature to designate any publication as a newspaper of general circulation is the purpose of requiring official notices to be published in a local newspaper so that the local citizens might rely upon their local newspaper to inform many of the proceedings of their own local officers and the affairs of public importance. See *The Application of the Monrovia Evening Post,* 199 Cal. 263.

It is contended by Appellant that no proper legislative purpose can be properly served by discriminating in the manner outlined in Section 6006 of the Government Code. There appears to be no logical reason why a petition for a probate of a will of a deceased resident in the County of Los Angeles, living in the City of Norwalk, is given any better publication if the newspaper which publishes is an established newspaper of general circulation prior to 1923, even though it is printed outside of the City. Nor is a delinquent taxpayer any better protected because his delinquent tax notice is published in a newspaper established prior to 1923. Must the Herald Publishing Company, the Appellant, install printing presses in order to compete with the claimed ancient establishiment of the "Norwalk Call"? Should invidious legislative discrimination be used to foster a monopoly in the vital area of news communication? Can the Legislature of 1961 arbitrarily pick out the year 1923 to give an economic advantage to citizens of the same class?

An analogous case is *Pirie v. Kamps,* 68 Wyo. 82, 229 P. 2d 927, and annotated in 26 A.L.R. 2d 647. Here the Wyoming Supreme Court held that a statute which required newspapers to be of a certain size other than the tabloid constituted a special law giving special privileges and contravention of the State Constitution, and held that legal notices published in tabloid newspapers were valid. The Court said:

> "The primary purpose of the founders of American constitutional law was to wipe out the entire system of legislative despotism over life, liberty and property, based in England not only upon a denial of the right to due process, but also upon the denial of the principles demanding generality and equality in the laws."

Further, quoting *Cooley on Constitutional Limitations* (6th Ed.), pages 481-483:

> "A statute would not be constitutional . . . which should select particular individuals from a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt."

And, further:

> "The test of the constitutionality of a statute ordinarily is not what has happened, but what may happen under it. So that the consequences of this particular statute are referred to, not as in themselves a sufficient reason for setting it aside, but as a graphic illustration of what may happen under it. And since it gives control of important and perhaps lucrative public business to a class

> of persons engaged in the publication of newspapers to the exclusions of all other lawfully engaged in the same business, and since that classification is based upon unreasonable and improperly discriminatory grounds, it tends to create such a monopoly as is denounced by article 41 of the Maryland Declaration of Rights, deprives persons so excluded from the equal protection of the law, is null and void."

As in all constitutional questions involving the Fourteenth Amendment, the validity of the classification does not follow any hard and fast rule, but an examination should be made of the nature of the thing being regulated. A newspaper may be a newspaper regardless of where and how it is printed. A newspaper may be an adequate vehicle for the publication of public notice as long as it has a place of publication within the community. A newspaper is not dependent upon the mechanical processes by which it is printed. While this may have been a distinction which attached to a newspaper in 1923, although it certainly cannot be agreed that it is the essence of a newspaper, it is irrelevant in this day and age where printing may be accomplished more efficiently and economically by many means other than the methods of 1923.

To choose an analogy, suppose the Legislature in 1961, in its wisdom, would determine that all lawyers admitted after 1923 would be required to have suitable electronic machinery for research, but that this requirement would not be applicable to those who had been admitted prior to 1923. Certainly the essence of a lawyer is not dependent upon the machinery with which his law office is equipped, but rather his knowledge and

use of the law. Likewise, a newspaper is not dependent upon the existence or non-existence of a printing press and a statute which makes a distinction which results in the lucrative public subsidy by reason of being a newspaper of general circulation is arbitrary and violates the prohibitions contained in the Fourteenth Amendment of the Constitution of the United States.

It would, therefore, appear that, because of the nature of the case, and the decisions of the District Court of Appeal and the Supreme Court upholding the constitutionality of California Government Code Section 6006, the case is within the jurisdictional provisions relied on in 28 U.S.C. Section 1257(2) and the cases heretofore cited.

It is submitted that the decision of the Supreme Court of California, which upholds the constitutionality of Section 6006 of the Government Code of the State of California, is unconstitutionally discriminatory under the Fourteenth Amendment, Section 1 of the Federal Constitution, and that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted,

JAMES G. BUTLER,
Counsel for Appellant.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

In the Matter of the Proposed Ascertainment and Establishment of the Standing of the "NORWALK CALL" as a Newspaper of General Circulation.

Whitehead-Donovan Corporation, Petitioner and Respondent, vs Herald Publishing Company, a California corporation, publisher of the "NORWALK HERALD AMERICAN", Contestant and Appellant. Civ. No. 27651.

Filed July 9, 1964.

Appeal from judgment of the Superior Court of Los Angeles County. F. Ray Bennett, Judge. Affirmed.

For Appellant: James G. Butler.

For Respondent: Robert F. Tyler.

This appeal is taken from the judgment granting respondent's petition for a judicial declaration of its status as a newspaper of general circulation for the City of Norwalk.

The facts are not in dispute. It is conceded that respondent meets all the requirements set forth in Articles 1 and 2 (sections 6000-6027) of Chapter 1, division 7 of Title 1 of the Government Code prerequisite to the challenged judicial establishment of its standing except that 50 per cent of the work of impressing type on paper is not being performed in the City of Norwalk. (Cf. Government Code, §§6000, 6003, 6004, 6004.5 and 6005.)

The evidence supports the finding of the trial court that respondent newspaper "was an established newspaper of general circulation prior to and at the time of and ever since the passage of Chapter 258 of the Statutes of 1923 of the State of California . . ." Applying section 6006 of the Government Code to this factual determination, the trial court concluded that respondent was not required to meet the printing requirements applicable to newspapers established after 1923.

Section 6006, as amended in 1961, provides: "Nothing in this chapter alters the standing of any newspaper which, prior to the passage of Chapter 258 of the Statutes of 1923, was an established newspaper of general circulation, irrespective of whether it was printed in the place where it was published for a period of one year as required, . . ." In its present form this section is substantially identical with former Political Code section 4465 as added by Statutes of 1923, chapter 258, section 3, page 513.

Appellant contends initially that the expression "established newspaper of general circulation" as used in the present Government Code section 6006 and in former Political Code section 4465 "means actual judicial establishment, that is, established by decree of court." We have concluded that this contention is erroneous and untenable.

Chapter 345 of the Statutes of 1905, which was applicable and in effect in 1923 (Political Code, §4462), provided that a court adjudication was not necessary in order for a newspaper to be established as one of general circulation. This section was enacted into the Government Code in 1943 as section 6027 which pro-

vided: "This article is not obligatory upon *nor does it require any newspaper to comply with its provisions in order to be in fact, or in law, a newspaper of general circulation.* Any newspaper may at its option avail itself of the provisions of this article." (Emphasis added.) It was not until 1951 that section 6027 was amended to require that "On and after July 1, 1952, a newspaper shall not be in fact or in law a newspaper of general circulation unless it obtains or has theretofore obtained a judicial decree establishing it as having such status pursuant to the provisions of this article."

In addition, respondent was declared to be a newspaper of general circulation for the *township* of Norwalk on May 21, 1926, the city being at that time unincorporated. The judgment in this earlier proceeding declared true the allegation that respondent newspaper had been "printed and published as a weekly newspaper at regular intervals in said Township, County and State for a period of more than one year last past, to wit: From on or about the first day of January, 1891, to the date hereof." Whether this order conclusively established respondent's standing for the years prior to 1926 we need not now decide. (Compare *In re The Anaheim Daily Gazette,* 214 Cal. App. 2d 438, 442 with *In re The Napa Journal,* 132 Cal. App. 339, 342.)

In the instant case, the trial court has found, upon the basis of sufficient evidence, that as a matter of fact respondent was so established as of May 30, 1923. No judicial establishment prior thereto was required. (Formal Political Code section 4462 and 4465; *In re The Anaheim Daily Gazette, supra,* pp. 441-445.)

Appellant's second contention is that, if respondent was an established newspaper in 1923, "it lost its es-

tablishment as a newspaper for the City of Norwalk in August, 1959." The record discloses that following the incorporation of the City of Norwalk in 1957, a judgment was entered on October 18, 1958, establishing respondent as a newspaper of general circulation therein. This judgment was subsequently vacated under section 6024, Government Code, upon a showing that at that time, as well as at the present, respondent newspaper was printed outside the said city. (*In re Norwalk Call,* 183 Cal. App. 2d 597.)

In 1951, the following concluding proviso was added to section 6006, Government Code, as quoted above: ". . . provided, however, that this section shall apply only in the event that said newspaper has altered neither the county, nor the town, nor the city of its publication or printing, or both, since the effective date of this act." This concluding restriction was eliminated by Statutes of 1961, chapter 217, section 1, thereby restoring section 6006 to its pre-1951 form which, as indicated, was substantially identical to former section 4465, Political Code. In commenting upon these consecutive amendments, the court in *In re The Anaheim Daily Gazette, supra,* page 444, stated:

"It now appears that section 6006 has the same legal effect as section 4465 of the old Political Code. This statute was applied and construed in *In re Byers, supra,* 219 Cal. 446, a case similar to the one at bar. Apparently, like its predecessor section 4465, section 6006 creates two classes of newspapers of general circulation: those in existence before 1923 and those initiated thereafter, and exempts those venerable publications of the first class from the requirement that printing be done in the place of publication. Apparently, the Legislature

recognized this distinction in 1951 when, with the *Byers* case in the books, it amended section 6006, expressly limiting its application to newspapers that had not altered the city of publication or printing since the effective date of the statute. This severe limitation upon the exemptive application of section 6006 was removed in 1961. Thus, the plain meaning of section 6006, as presently in force, is to free newspapers of general circulation in existence before 1923 from the requirement that they be printed in the place of publication. This interpretation is compelled by the unambiguous language of section 6006."

Additionally, it should be noted that, even though it be conceded respondent, "lost its establishment as a newspaper for the *City* of Norwalk in August, 1959" this could not cause it to lose its standing as a "newspaper which, prior to the passage of Chapter 258 of the Statutes of 1923, was an established newspaper of general circulation, . . ." (Government Code, §6006 as amended in 1961.)

Appellant next contends that even if it be conceded that respondent was an established newspaper prior to 1923, nevertheless it could not have been so established for the City of Norwalk, because that city was not incorporated until 1957. Although this undoubtedly is true, the exception created by Government Code section 6006 in its present form, and by former Political Code section 4465, supplies no limitation arising from a change in the political structure or entities within the confines of the area in which the excepted newspaper was established in 1923. While it might well be appropriate and good policy to make such changes a point of limitation upon the otherwise indefinite favor-

able treatment extended the excepted newspapers, this is a matter for *legislative* rather than *judicial* determination. The intent of the Legislature in this respect appears to be clearly indicated by its enactment of the limitation to section 6006 in 1951 and its subsequent repeal thereof in 1961 as heretofore discussed.

Lastly, appellant contends that section 6006 is unconstitutional. "Appellant's arguments in support of this contention are quite persuasive and very similar to those which apparently were accepted by the appellate court whose decision it cites. It was therein stated: "To say, however, that the Legislature intended to prescribe for all times one set of requirements for newspapers theretofore established and a different set for newspapers to be established in the future would be to give to the amendment such a construction that the reasonableness thereof would become a serious question." (*In re Byers,* 25 Pac. 2d 236, 237.) However, a hearing was granted following this decision, and upon the same issue the court stated:

"The further contention is made that such a construction of these sections of the Political Code renders the same unconstitutional and void for the reason that it is an attempt to classify the newspapers in the state into two classes, those established before the legislation of 1923, which are free from the requirements of such legislation, and those established at a later date, which are forced to comply with such requirements. This same contention in principle has been before this court on frequent occasions, one of the most recent of which was in the case of *Jones v. City of Los Angeles,* 211 Cal. 304 [295 Pac. 14]. We there held that an ordinance excluding hospitals and sanitariums for the treat-

ment of mental and nervous diseases from certain districts in said city was valid in so far as it purported to prohibit the establishment of such institutions within said district in the future, but that it was void when applied to an existing business of the same character in said district. Such a classification, if we may properly use that term, may not be said to be an unreasonable application of the police power. Upon the same principle, it cannot be said in the present action that it is unreasonable to exact certain requirements of a newspaper to be established in the future which are not required of those long established and which have proved their right to exist by a full compliance with all the laws in force at the time of their establishment." (*In re Byers, supra,* 219 Cal. 446, 450:)

The decision since has been cited with approval in *Hunter v. Justice's Court,* 36 Cal. App. 2d 315, 321 and *People v. Western Fruit Growers,* 22 Cal. 2d 494, 508. If any redetermination of this issue of law is now to be made, it is beyond the province of this court to do it.

The judgment is affirmed.

Herndon, Acting *P. J.*

I concur.

Roth, *J.*

Concurring Opinion.

I concur in the judgment through the following reasoning:

Beginning with the statute of 1923, section 4465, Political Code, (codified as section 6006, Government Code in 1943), has contained a "grandfather clause" reading: "Nothing in this chapter alters the standing of any newspaper which, prior to the passage of Chapter 258 of the Statutes of 1923, was an established newspaper of general circulation, irrespective of whether it was printed in the place where it was published for a period of one year as required; . . ."

In 1951 this section was amended by adding the following proviso: ". . . provided, however, that this section shall apply only in the event that said newspaper has altered neither the county, nor the town, nor the city of its publication or printing, or both, since the effective date of this act." This limitation remained in the statute until the 1961 Legislature eliminated it, thus restoring the section to its original flat exemption of a newspaper which was actually an established one prior to the 1923 statute. No court decree establishing the status of a pre-1923 newspaper was required until 1951. The 1943 section 6027 said: "This article is not obligatory upon nor does it require any newspaper to comply with its provisions in order to be in fact, or in law, a newspaper of general circulation. Any newspaper may at its option avail itself of the provisions of this article." In 1951 the section was amended to read as follows: "On and after July 1, 1952, a newspaper shall not be in fact or in law a newspaper of general circulation unless it obtains or has

theretofore obtained a judicial decree establishing it as having such status pursuant to the provisions of this article." It has so remained at all times since.

Being a pre-1923 publication the Call apparently had no court decree establishing its status with respect to the *City* of Norwalk,[1] so it in 1958, being confronted by the terms of section 6027, obtained a judgment declaring it to be a newspaper of general circulation for the *City* of Norwalk. (See page 3 of Clerk's Transcript in 2nd Civil No. 24300, of which we take judicial notice.)

On May 14, 1959, Mr. T. A. Garrett filed a petition to vacate the 1958 decree upon the ground that the Call had ceased to be a newspaper of general circulation in that it was printed outside the City of Norwalk contrary to the terms of section 6003, Government Code. (See page 1 of Supplemental Clerk's Transcript in 2nd Civil No. 24300.) After contested hearing, this petition was granted and decree made on July 14, 1959 to the effect that the Call was a newspaper of general circulation of the County of Los Angeles but not of the City of Norwalk because printed outside the city. (See page 14 of original Clerk's Transcript in No. 24300.) This judgment was affirmed in In re Norwalk Call, 183 Cal. App. 2d 597 upon the ground that evidence of change in the place of printing authorized the ruling because that change had occurred after the July, 1959 judgment which spoke of the time of its rendition and had no effect upon subsequent events.

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[1]The 1926 decree mentioned in the majority opinion established the newspaper's status with respect to the *township* of Norwalk, there being no city of that name at that time.

As I read that proceeding it involved only the question of whether the Call had lost its status because of violation of the provisions of section 6003. The instant proceeding invokes establishment through long publication prior to 1923 as basis for a decree of establishment required by section 6027. The question thus arises whether the decree of 1959 is res judicata of the instant proceeding.[2] I think not. In my judgment it falls within the rationale of these authorities: 29 Cal. Jur. 2d, section 242, page 204: "It [the res judicata rule] has no application to independent matters that the parties may but are not required to, and do not in fact, plead or rely on. It may be that a plaintiff might have united other causes of action with that set out in his complaint, but as long as these several matters are not tendered as issues in the action, they are not affected by it." See *Daugherty v. Board of Trustees,* 111 Cal. App. 2d 519, 521-2; *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp.,* 117 Cal. App. 2d 221, 229-30; *Title Guarantee & Trust Co. v. Monson,* 11 Cal. 2d 621, 631-3; *Estate of Setzer,* 192 Cal. App. 2d 634, 640; *Stout v. Pearson,* 180 Cal. App. 2d 211, 215; *Lord v. Garland,* 27 Cal. 2d 840, 849.

The *Hayward* opinion says, at page 229: ". . . One of the principal requirements for the application of the doctrine of res judicata is: Was the issue decided in the previous action identical with the one pre-

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[2]This is not a situation in which it was necessary to plead res judicata (*Solari v. Atlas-Universal Service, Inc.,* 215 Cal. App. 2d 587, 592), nor does appellant's failure to rely on the 1959 decree preclude our consideration of it when it stares us in the fact (*Amer. Auto. Ins. Co. v. Seaboard Surety Co.,* 155 Cal. App. 2d 192, 200; *Escobedo v. Travelers Ins. Co.,* 197 Cal. App. 2d 118, 127.)

sented in the present suit? (*Bernhard v. Bank of America*, 19 Cal. 2d 807, 813 [122 P. 2d 892].)

"In *Stark v. Coker*, 20 Cal. 2d 839, 843 [129 P. 2d 390], the court points out that only such matters are adjudicated in a prior judgment which appear upon its face to have been adjudicated or which were necessarily included therein, and that 'when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue.' Likewise, the rule may not be invoked merely because the rights, claims or demands arise out of the subject matter involved in a prior litigation, so long as they constitute separate or distinct causes of action which were not placed in issue in the former case. (*Title Guar. & Tr. Co. v. Monson*, 11 Cal. 2d 621, 631 [81 P. 2d 944].)"

Thus I reach the conclusion that the 1959 judgment is not a bar or an estoppel with respect to the instant case. That removes the only obstacle to my joining in an affirmance of the judgment at bar.

Ashburn, *J.**

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*Retired Justice of District Court of Appeal sitting pro tempore under assignment by Chairman of Judicial Council.

APPENDIX B.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

In re Establishment of Norwalk Call, as a Newspaper of General Circulation, Whitehead-Donovan Corporation, Petitioner and Respondent, v. Herald Publishing Company, Contestant and Appellant. L. A. 27516.

Filed Dec. 21, 1964.

In accordance with statutory procedure, the petitioner sought a decree declaring it to be a newspaper of general circulation for the City of Norwalk, and the contesting newspaper filed an answer opposing such a decree (See Gov. Code, §§ 6020-6023; 6027.) The trial court found in favor of petitioner.

The Government Code provides that whenever any official advertising, notice, resolution, order, or other matter is required by law to be published in a newspaper, such publication shall be made only in a "newspaper of general circulation" (§ 6040), and that term is defined in section 6000 as a newspaper for the dissemination of news and intelligence of a general character which has a bona fide subscription list of paying subscribers and has been "established, printed and published" at regular intervals for at least one year preceding publication in the state, county, or city where the publication is to be made.[1] The word "established"

[1]Some of the statutory provisions discussed, including those just cited, have been in existence for many years and formerly appeared elsewhere than in the Government Code. For convenience, all provisions will be cited by reference to sections of the Government Code, except where it becomes appropriate to refer to earlier statutes.

is defined as referring to a newspaper which has been in existence under a specified name for the whole of the one-year period. (§ 6002.) Until 1923 a newspaper could qualify as "printed and published" within the meaning of the predecessor of section 6000 even though the physical act of printing was not performed in the place where the paper was to appear (In re McDonald (1921) 187 Cal. 158), but in that year the Legislature adopted provisions, still in effect, defining "printed" and "published" in such manner that a newspaper could not be deemed one of general circulation for an area unless 50 per cent of the mechanical work of typesetting and impressing type on paper was completed there. (§§ 6003, 6004.)

Also in 1923, however, the Legislature enacted the provision involved in this proceeding (§ 6006), declaring, "Nothing in this chapter alters the standing of any newspaper which, prior to the passage of Chapter 258 of the Statutes of 1923, was an established newspaper of general circulation, irrespective of whether it was printed in the place where it was published for a period of one year as required." In 1951 this section was amended to add the proviso, "provided, however, that this section shall apply only in the event that said newspaper has altered neither the county, nor the town, nor the city of its publication or printing, or both, since the effective date of this act." The proviso was eliminated in 1961 by an amendment, thus restoring the statute to the form in which it was enacted in 1923.

It is undisputed that for many years before 1923 petitioner conducted its operations in the township of Norwalk, then unincorporated, in a manner entitling it to be a newspaper of general circulation under the law

then existing and that it has continued to operate in such a manner. Petitioner does not meet the printing requirement added in 1923 and therefore necessarily relies on the exemption contained in section 6006.

In making its principal contention that section 6006 arbitrarily discriminates against newspapers established after enactment of the 1923 legislation, contestant is in effect asking this court to overrule In re Byers (1933) 219 Cal. 446. It was held there that the exemption was intended to relieve existing newspapers of general circulation, i.e., those meeting the standards prescribed as of 1923, from the burden of satisfying the new printing requirement and that such a classification differentiating established businesses from those to be established in the future was reasonable. *Byers* said it was not "unreasonable to exact certain requirements of a newspaper to be established in the future which are not required of those long established and which have proved their right to exist by a full compliance with all the laws in force at the time of their establishment." (219 Cal. at p. 450. Accord, In re The Anaheim Daily Gazette (1963) 214 Cal.App.2d 438.) In re The Napa Journal (1933) 132 Cal.App. 339, 342, contains broad language to the contrary, but it was decided six months prior to *Byers* and may be deemed to have been disapproved sub silentio.

Legislation excusing existing businesses from noncompliance with new regulations has frequently been upheld (Hunter v. Justice's Court (1950) 36 Cal.2d 315, 320; People v. Western Fruit Growers (1943) 22 Cal.2d 494, 508; In re Weisberg (1932) 215 Cal. 624, 631; Matter of Stoltenberg (1913) 165 Cal. 789; Ex parte Whitley (1904) 144 Cal. 167, 171; Bohannon

v. Board of Medical Examiners (1914) 24 Cal.App. 215; see discussion in 3 Witkin, Summary of Cal. Law (7th ed., 1960) 1958; 12 Am.Jur. 164; 136 A.L.R. 207, 220), and there would seem to be no persuasive reason to reach a different result here, or to disapprove the conclusion in *Byers*.

On October 18, 1958, judgment was entered by the Superior Court of Los Angeles County establishing the petitioner to be a newspaper of general circulation in the City of Norwalk. The following year, in proceedings under section 6024, the court vacated the judgment, and the order was affirmed (In re Norwalk Call, 183 Cal.App.2d 597) on the ground that while petitioner was a newspaper of general circulation in the county, it had ceased to be a newspaper of general circulation for the City of Norwalk since it was not printed in the City of Norwalk. Neither the exemption in section 6006 nor the proviso to it then in force were cited or discussed, and there is no indication in the opinion that any consideration was given to petitioner's status in the light of the exemption.

Contestant has not contended that the vacation of the 1958 decree is res judicata, and we do not find that it is, since the court there did not discuss the issue or reach any conclusion as to the applicability of the exemption in section 6006. Res judicata is not a valid plea unless the issue decided in the prior adjudication was identical with that presented in the instant action. (Bernhard v. Bank of America (1942) 19 Cal.2d 807, 813.)

Petitioner and the trial court rely, and we believe properly so, upon the conclusion in In re The Anaheim Daily Gazette, supra, 214 Cal.App.2d 438, where, at

page 441, the court said: "We must conclude that the elimination of the proviso (portion repealed) was done for a purpose. The repeal placed the section back to its original interpretation as expressed in In re Byers, supra, 219 Cal. 446."[2]

If, as here, a newspaper met all the requirements to qualify as an established newspaper of general circulation before 1923 and has continued to meet all the standards in force at that time, it should not be prohibited from relying on the exemption for the sole reason that during some intervening period of time in the past it did not meet another requirement added by the Legislature and subsequently eliminated.

Two additional contentions made by contestant appear to be lacking in merit, namely, that petitioner cannot properly qualify under section 6006 as "an established newspaper of general circulation" before 1923 because

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[2]The facts in *In re The Anaheim Daily Gazette*, cited above, are significantly similar to those in the instant case. The Gazette had been in existence since 1870, its circulation was in Anaheim but it moved its printing plant to neighboring Orange. The contention was made that it thus ceased to be a newspaper of general circulation in Anaheim. In that context the court held that elimination of the proviso reinvested the code section with the interpretation expressed in In re Byers, 219 Cal. 446. The purpose of section 6006, said the court in *In re The Anaheim Daily Gazette* at page 444, is to create "two classes of newspapers of general circulation: those in existence before 1923 and those initiated thereafter, and exempts those venerable publications of the first class from the requirement that printing be done in the place of publication. Apparently, the Legislature recognized this distinction in 1951 when, with the *Byers* case in the books, it amended section 6006, expressly limiting its application to newspapers that had not altered the city of publication or printing since the effective date of the statute. This severe limitation upon the exemptive application of section 6006 was removed in 1961. Thus, the plain meaning of section 6006, as presently in force, is to free newspapers of general circulation in existence before 1923 from the requirement that they be printed in the place of publication. This interpretation is compelled by the unambiguous language of section 6006."

at that time it had obtained no court decree so declaring, and that petitioner cannot come within the exempting language relating to the City of Norwalk because that city was not incorporated until after 1923. No statute requiring a newspaper to obtain a court decree as to its status was passed until 1951 (§ 6027). Between 1905 and 1951 it was expressly provided that the acquisition of such a decree was merely optional and was not essential for the qualification of a newspaper as one of general circulation (former Pol. Code, § 4462; Gov. Code, former § 6027). Nor does anything in the exempting statute suggest that a newspaper which, since before 1923, has been an established one of general circulation for a given territorial area is not entitled to exemption if changes in the political structures or names of governmental entities within that area have occurred after 1923. The purpose of limiting publication to newspapers meeting certain standards is to assure that the published material will come to the attention of asubstantial number of persons in the area affected (see Aspplication of Monrovia Evening Post (1926) 199 Cal. 263, 269), and, of course, a nesspaper meeting the standards does not forfeit its ability to serve that purpose merely because changes occur in the name or political structure of the area.

The judgment is affirmed.

Mosk, *J.*

We concur:

Mc Comb, *J.*
Peek, *J.*
*Schauer, *J.*

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Dissenting Opinion by Traynor, C.J.

In Re Norwalk Call — L. A. 27516

The petitioner, the Norwalk Call, and the contesting newspaper, the Norwalk Herald American, are both newspapers of general circulation for the County of Los Angeles published in the City of Norwalk. Neither is "printed" in that city, however, since more than 50% of the mechanical work of typsetting of each is done elsewhere. (Gov. Code, §§ 6003, 6004.) Failure to meet this printing requirement prevents their being newspapers of general circulation for the City of Norwalk. Only such newspapers have the significant advantage of being qualified to publish official notices for the City of Norwalk (Gov. Code, §§ 6040-41), unless there are no such newspapers, in which case publications may be made in newspapers of general circulation in the nearest jurisdiction. (Gov. Code, § 6042.)

Petitioner seeks a decree declaring it to be a newspaper of general circulation for the city, contending that the Legislature exempted it from the printing requirement when it amended section 6006 of the Government Code in 1961. The effect of this amendment, petitioner contends, is to exempt newspapers that qualified as newspapers of general circulation in 1923 from the printing requirement, although newspapers not then established, like the Norwalk Herald American, still must meet the requirement. It is my opinion that if the legislation is construed to grant this privilege to petitioner, it would deny the Norwalk Herald American equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. (See also Cal. Const., art. I, §§ 11, 21.) I believe, however, that it can be reasonably construed as not granting petitioner this privilege.

When section 6006 was amended in 1961, neither the petitioner nor the contestant was a newspaper of general circulation for the City of Norwalk. It is true that the Norwalk Call was a newspaper of general circulation for Norwalk before the printing requirement was added in 1923. (Pol. Code, § 4463, now Gov. Code, §§ 6003, 6004.) It continued as such a newspaper after 1923 because of the enactment in that year of a "grandfather clause," exempting newspapers already established from the requirement. (Pol. Code, § 4465, now Gov. Code, § 6006.) In 1951, however, the Legislature added a proviso to the grandfather clause[1] and also required a judicial decree to establish that a newspaper is one of general circulation. (Gov. Code, §§6006, 6027.) Petitioner obtained such a decree in 1958, but the judgment was vacated in 1959 on the ground that petitioner did not meet the requirements of a newspaper of general circulation. (In re Norwalk Call, 183 Cal.App.2d 597.) Therefore, for several years before the 1961 legislation, the Norwalk Call had ceased to be a newspaper of general circulation for the City of Norwalk.

Petitioner contends that the "repeal [of the 1951 proviso] placed the section back to its original interpretation" (In re The Anaheim Daily Gazette, 214 Cal.App.2d 438, 441) and therefore restored its status as a newspaper of general circulation for the City of Norwalk, which it had lost when the proviso was in effect. When the Norwalk Call lost its status as a newspaper of general circulation for the City of Nor-

[1] "[P]rovided, however, that this section shall apply only in the event that said newspaper has altered neither the county, nor the city of its publication or printing, or both, since the effective date of this act." (Gov. Code, § 6006.)

walk, however, its position became identical with that of the Norwalk Herald American. At that time both were newspapers whose printing establishments were outside the city, and both would have had to alter this arrangement to qualify for the advantages of a newspaper of general circulation for the city. If the 1961 amendment operated to confer the privilege of exemption on pre-1923 newspapers only, it discriminated not between new and old businesses, as it did in 1923 but between two already established businesses.

Application of the 1961 amendment to distinguish petitioner and contestant cannot be justified on the rationale of the grandfather clause. Although such clauses create an undesirable lack of uniformity by favoring existing businesses over new ventures, they are upheld to protect existing businesses from the burdens sometimes involved in conforming to new regulations. (Harris v. Alcoholic Bev. etc. Appeals Bd., 61 A.C. 299, 304; Hunter v. Justice's Court, 36 Cal.2d 315, 321; People v. Western Fruit Grower's, 22 Cal.2d 494, 508; Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 585.) These clauses imply that "through the process of natural attrition, those qualified for the exemption would gradually diminish in numbers until no more existed." (Harris v. Alcoholic Bev. etc. Appeals Bd., supra, 61 A.C. 299, 304.) Thus, we upheld the original grandfather clause passed in 1923 since it was not "unreasonable to exact certain requirements of a newspaper to be established in the fu-

ture which are not required of those long established. . . ." (In re Byers, 219 Cal. 446, 450.) The Legislature decided that the alteration of an established newspaper's printing arrangements would be a greater burden than the initiation of printing in the manner prescribed. In this case, however, both petitioner and contestant are established businesses. Each would have similar difficulties in altering its printing arrangements to qualify for the advantages of a newspaper of general circulation. Application of the 1961 amendment to petitioner would not preserve a distinction between established and new newspapers but would create an inequity by favoring one established newspaper over another.

A classification that bears no reasonable relation to a proper legislative objective is invalid. (Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 233; Werner v. Southern Cal. etc. Newspapers, 35 Cal.2d 121, 131, appeal dismissed, 340 U.S. 910.) Once the reason for conferring a special privilege ends, the privilege must end. Thus, in Harris v. Alcoholic Bev. etc. Appeals Bd., supra, 61 A.C. 299, this court refused to extend the privilege of a grandfather exception to a transferee of the original business. The court reasoned that the justification of protecting existing establishments was no longer applicable. In this case, the 1961 selection of 1923 as the crucial year for conferring the exemption bears no relation to the burden involved in conforming to the printing requirement.

This court has often condemned the selection of an arbitrary date as the cut-off point in the conferring of special privileges. (Accounting Corp. of America v. State Board of Accountancy, 34 Cal. 2d 186, 190; Van Harlingen v. Doyle, 134 Cal. 53, 56-57.) Just as the original 1923 grandfather clause would have been invalid had it exempted businesses established in 1895, an exemption in 1961 of businesses established in 1923 must likewise be condemned.

We should construe section 6006 to avoid unconstitutionality if it can reasonably be so construed. (Lynch v. Overholser, 369 U.S. 705, 710-711; Geiger v. Board of Supervisors, 48 Cal.2d 832, 839.) The section reads: "Nothing in this chapter *alters the standing* of any newspaper which, prior to the passage of Chapter 258 of the Statutes of 1923, was an established newspaper of general circulation, irrespective of whether it was printed in the place where it was published for a period of one year as required." (Italics added.) The Norwalk Call, however, was not a newspaper of general circulation for the City of Norwalk when the 1961 amendment was adopted. Application of the printing requirement to the petitioner will not alter its standing as of the effective date of the 1961 amendment. To invoke that amendment to make it a newspaper of general circulation for the City of Norwalk now would alter its standing: its standing would be altered from that of a newspaper that was not a newspaper of general circulation for the City of Norwalk to one that was.

The purpose of a grandfather clause is to preserve the current status of a newspaper not to restore a former status. Such an interpretation is reasonable and avoids unconstitutional implications. Laguage in In re The Anaheim Daily Gazette, supra, 214 Cal.App.2d 438, 444, that would extend to cases like the present one in which the pre-1923 standing has been lost should be disapproved.

In my opinion section 6006 not only does not but cannot constitutionally exempt the Norwalk Call from the printing requirement. I would therefore reverse the judgment.

Traynor, *C. J.*

We Concur
Peters, *J.*
Tobriner, *J.*

APPENDIX C.

Judgment and Decree Establishing Newspaper as One of General Circulation.

Superior Court of the State of California, for the County of Los Angeles.

In the Matter of the Proposed Ascertainment and Establishment of the Standing of the "Norwalk Call" as a Newspaper of General Circulation, Whitehead-Donovan Corporation, Petitioner, Herald Publishing Company, a California corporation, publisher of the "Norwalk Herald American" Contestant. No. 800-683 Filed May 6, 1963.

The Petition of Whitehead-Donovan Corporation for the ascertainment and establishment of the standing of the "Norwalk Call" as a newspaper of general circulation for the City of Norwalk, and for the County of Los Angeles and for the State of California, came on regularly to be heard in Department 26 of the above entitled Court, the Honorable F. Ray Bennett, Judge Presiding, on the 7th day of December, 1962, and again on the 10th day of January, 1963, Robert F. Tyler, Esq. appearing on behalf of the Petitioner Whitehead-Donovan Corporation, and the Herald Publishing Company, a California corporation, publisher of the "Norwalk Herald American" appearing to contest said Petition by its counsel James G. Butler, Esq.; a jury having been waived, and evidence, both oral and documentary, having been introduced, as well as the arguments and written briefs of counsel, and the Court, having heard the testimony of the witnesses, and all of the evidence, and having caused to be filed herein its Findings of Fact and Conclusions of Law, in which

the Court found, among other matters, that the substance of said petition of Whitehead-Donovan Corporation was published for more than ten days in the petitioning newspaper the Norwalk Call together with a notice of the time and place when the petitioner intended to make application to the Court to have said petition heard and determined, and that further publication thereof was made for a period of ten days in the Bellflower Herald-Enterprise, a newspaper of general circulation, published in the County of Los Angeles, there being no newspaper of general circulation published in the City of Norwalk at the time the petition herein was filed, and that proof of the publication of said petition and notice has been duly made as to both of the foregoing newspapers; namely, the Norwalk Call and the Bellflower Herald-Enterprise all as is more particularly shown and set forth in the Affidavits of Publication executed on behalf of each of said publishing newspapers aforesaid, which affidavits are on file herein; and the Court further found among other matters that it had fixed the 18th day of September, 1962, in Department 63 of the Court as the time and place of hearing said Petition, and that at said time and place the parties appeared by and through their respective counsel and that said matter was transferred from Department 63 of the above entitled Court to Department I of said Court and the date of hearing set by stipulation of the parties to December 7, 1962, at which time the matter was heard and then continued

for further hearing to January 10, 1963, all parties being present at all times by and through their respective counsel;

Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

I

That the newspaper, the "Norwalk Call" is a newspaper of general circulation for the City of Norwalk, for the County of Los Angeles, and for the State of California.

II

That Petitioner Whitehead-Donovan Corporation have and recover its costs from Contestant Herald Publishing Company.

Dated: May 6, 1963.

F. Ray Bennett
Judge

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 11 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 156

In re Establishment of NORWALK CALL as a Newspaper of General Circulation.

WHITEHEAD-DONOVAN CORPORATION,

Appellee,

vs.

HERALD PUBLISHING COMPANY,

Appellant.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

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TABLE OF AUTHORITIES CITED

Cases	Page
Monrovia Evening Post, The Application of, 199 Cal. 263	4
St. Louis Railway Co v. Missouri, 15 S. Ct. 443, 156 U.S. 478, 39 L. Ed. 502	3

IN THE

Supreme Court of the United States

October Term, 1964
No. .....

In re Establishment of NORWALK CALL as a Newspaper of General Circulation.

WHITEHEAD-DONOVAN CORPORATION,

Appellee,

vs.

HERALD PUBLISHING COMPANY,

Appellant.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

Appellee, Whitehead-Donovan Corporation, a California corporation, hereby moves the Court that it dismiss the within appeal from the Judgment rendered by the Supreme Court of the State of California on the grounds that it does not present a substantial federal question.

There is no evidence in the record from the lower courts and now before this Court to support Appellant's averments in its Jurisdictional Statement that any federal question as to an invalid discrimination is a sub-

stantial one. On page 11, last line of its Jurisdictional Statement Appellant states that "By giving a constitutional economic advantage to those newspapers who can qualify under the 1961 amendments, the court has tipped the economic balance in favor of any such newspaper, or the successor in interest of any such newspaper, by allowing the economic aid from the publication of official publications for cities, school districts, courts and such other publications as are required to be published within the city". This is a statement of counsel. No evidence appears in the record to support it. "Tipping the economic balance" denotes that by force of the questioned statute alone appellee newspaper is made economically predominant over appellant. But nothing in the record shows the relative economic positions of appellant and appellee before and after application of the questioned statute. If the evidence does not show such a relative alteration in appellant's economic position by reason of the statute, where lies the discrimination? What advertising did appellant lose by reason of the fact that it is a newspaper of general circulation for the County of Los Angeles instead of for both the County and City of Los Angeles as is the appellee? How much school district, court or other advertising was lost by appellant since the operation of the statute as contrasted with before? Actually many factors much more important than printing public notices of the City of Norwalk may affect the relative competitive positions of appellant and appellee, as for example whether the newspapers are individual community newspapers or components of a newspaper chain with a central printing plant, what the respective advertising rates are, what the respective distributions or circulation may be, whether or not appellant actually suffered any sub-

stantial loss of legal advertising. None of these matters were put into evidence by appellant at any stage of the proceedings. If the appellant desired to show that the legal advertising here involved "tipping the economic scale", appellant should have introduced evidence in the court below at the proper stage of proceedings, thereby giving appellee an opportunity to counter with cross-examination or rebuttal evidence of its own. The burden was at all times on appellant to show the discrimination and its unreasonableness and not on the appellee to show the lack thereof.

Appellant states on page 12 of its Jurisdictional Statement that "It has been noted by many that the economics of the newspaper business have led to the elimination of competition in most cities (citing the Freedom of Press Symposium). Again, it is appellant's duty to relate the question of eliminating competition from "most cities" to the City of Norwalk, California, and from "many newspapers" to the two here in question.

The bare averment of a federal question without an adequate record to support it is not sufficient. (*St. Louis Railway Co. v. Missouri,* 15 S. Ct. 443, 156 U. S. 478, 39 L. Ed. 502.) The record itself should show existence of an actual discrimination, its nature, how it affects appellant, and why it is unfair or unreasonable. Did this claimed discrimination actually place appellant at an unfair advantage vis a vis appellee? If so in what way? How substantially? Is the legislature justified in the distinction it made? But appellant's averments as to discrimination and unfairness remain barren of actual facts to support them.

As opposed to the lack of facts in the record from which the actual unreasonableness or unfairness of any

discrimination may be adduced is the valid reason which has always existed for permanency and stability in order that a newspaper may be sufficiently established to provide a reliable medium for publication of official notices which can sometimes affect individual legal rights. Appellant has indicated this on page 13 of its Jurisdictional Statement where it cites *The Application of the Monrovia Evening Post,* 199 Cal. 263. The requirement of a printing press under the adjudication statutes is one of those factors encouraging the maintenance of a fixed abode and the stability deemed desirable for a newspaper if it is to publish official notices. The only exception to the statutory requirements in Sections 6000 and the following sections of the Government Code cited by Appellant in its Jurisdictional Statement is the one here called into question (Section 6006 of the Government Code of the State of California) exempting those newspapers from the printing requirement where their historical establishment over a long period of years, such as the 75-year old Norwalk Call, gives them a stability and permanence of residence which in the apparent belief of the California legislature can excuse them from the particular printing requirement. In a state growing as rapidly as California the legislature might well feel that stricter requirements will be necessary for adjudication of newspapers in future years. It is not unusual in our increasingly complex society for governmental authority to create more stringent regulations governing the exercise of businesses and professions, nor is it unusual to exempt already established businesses and professions from the new stricter requirements, whether in the field of zoning, or in the practice of professions or the engaging

in various forms of business enterprise. Not all discriminations made by governmental authority are invalid. Where there is patent unfairness or unreasonableness the constitutional prohibition may apply. But the legislature's discretion in this field is not invaded lightly. And certainly not without evidentiary support in the record.

Respectfully submitted,

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ROBERT F. TYLER,
By GEORGE G. SHAPITRIC,
Attorneys for Appellee.